

***NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 03-201-02  
SEPTEMBER 21, 1999***

***Habitat Conservation and Restoration  
Essential Fish Habitat Policy***

***PROGRAMMATIC EFH CONSULTATION WITH ARMY CORPS  
OF ENGINEERS ON NEW AND MODIFIED NATIONWIDE PERMITS***

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***SUMMARY OF REVISIONS:***

Signed \_\_\_\_\_  
[Approving Authority name] Date  
[Approving Authority title]

Brigadier General Hans A. Van Winkle  
Deputy Commander for Civil Works  
U.S. Army Corps of Engineers  
20 Massachusetts Avenue, N.W.  
Washington, D.C. 20314

Dear General Van Winkle:

Thank you for your letter of August 25, 1999, requesting programmatic Essential Fish Habitat (EFH) consultation pursuant to section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) regarding the proposed new and modified Nationwide Permits (NWPs) published in the *Federal Register* on July 22, 1999 (64 FR 39252). We have reviewed the *Federal Register* notice and the draft environmental assessments (EAs) contained in the preliminary decision documents, and consulted with the National Marine Fisheries Service (NMFS) regional offices in developing our comments and EFH Conservation Recommendations.

Pursuant to section 305(b)(4)(A) of the MSFCMA, the enclosure to this letter contains NMFS programmatic EFH Conservation Recommendations for the proposed action, as well as general comments on the *Federal Register* notice. Pursuant to section 305(b)(4)(B) of the MSFCMA, the U.S. Army Corps of Engineers (ACOE) is required to respond to these EFH Conservation Recommendations within 30 days of their receipt. This response shall include a description of measures proposed by ACOE to avoid, mitigate, or offset the impact of the NWPs on EFH. If the ACOE's response is inconsistent with the EFH Conservation Recommendations, ACOE shall explain its reasons for not following the recommendations. NMFS understands that 30 days may be insufficient time for ACOE to complete its review of all comments received on the NWPs, and thus ACOE may be unable to respond fully within the 30-day timeframe specified in the MSFCMA. If this is the case, we recommend that ACOE send NMFS a preliminary

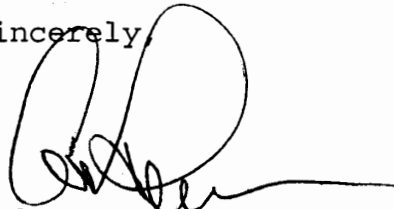
response within the 30 day period, followed by a final response when the reviews and the revisions are completed.

As part of the programmatic EFH consultation process, and as required by section 305(b)(4)(A) of the MSFCMA, NMFS regional offices will be developing regional EFH Conservation Recommendations to address any potential adverse effects on EFH. NMFS will strive to provide these EFH Conservation Recommendations within the comment period provided by the July 22, 1999 public notice, but there may be cases when additional information is needed and NMFS requests an extension of the comment period.

Pursuant to section 305(b)(4)(B) of the MSFCMA, the ACOE is required to respond, as described above, to the EFH Conservation Recommendations provided by the NMFS regional offices. Since the NMFS regional EFH Conservation Recommendations are part of this programmatic consultation, the ACOE may choose to provide one response to all of the NMFS EFH Conservation Recommendations (note the statutory 30-day time period described above). Alternatively, the ACOE Headquarters Office may choose to respond only to the EFH Conservation Recommendations contained in the enclosure to this letter, and the ACOE Districts may respond directly to NMFS regional offices that provide any additional EFH Conservation Recommendations.

If you have any questions concerning this programmatic EFH consultation, please do not hesitate to contact me or Susan-Marie Stedman of my staff at 301/713-2325.

Sincerely,

A handwritten signature in black ink, appearing to read 'Andrew J. Kemmerer', written over a large, loopy initial 'A'.

Andrew J. Kemmerer, Ph.D.  
Director  
Office of Habitat Conservation

Enclosure

**Programmatic Essential Fish Habitat Consultation  
with Army Corps of Engineers  
on New and Modified Nationwide Permits  
September 21, 1999**

Pursuant to section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), the National Marine Fisheries Service (NMFS) and the U.S. Army Corps of Engineers (ACOE) have initiated programmatic Essential Fish Habitat (EFH) consultation regarding the proposed new and modified Nationwide Permits (NWP) published in the *Federal Register* on July 22, 1999 (64 FR 39252).

Summary of Proposed Action

The five new NWPs and six modified NWPs that are the subject of this consultation authorize a range of activities in waters of the United States, including wetlands. They include:

- Maintenance [existing structures, fill, or uplands] (NWP 3)
- Outfall Structures and Maintenance (NWP 7)
- Utility Activities (NWP 12)
- Linear Transportation Crossings (NWP 14)
- Stream and Wetland Restoration Activities (NWP 27)
- Residential, Commercial, and Institutional Development (NWP 39)
- Agricultural Activities (NWP 40)
- Reshaping Existing Drainage Ditches (41)
- Recreational Facilities (NWP 42)
- Stormwater Management Facilities (NWP 43)
- Mining Activities (NWP 44)

Each proposed permit includes restrictions such as limits on the acreage or linear feet, or conformance with other requirements, to ensure that the activities authorized by the NWPs do not cause more than minimal adverse effects, individually or cumulatively, to aquatic habitat. Many of the proposed NWPs do not authorize activities in tidal waters, tidal wetlands, or non-tidal wetlands adjacent to tidal waters. In addition, a number of general conditions restrict the use of the NWPs in the following areas: areas of concentrated shellfish populations; fish spawning areas; critical resource waters (including National Marine Sanctuaries, National Estuarine Research Reserves, and critical habitat for Federally-listed threatened and endangered species); state-designated impaired waters; and the 100-year floodplain. Most importantly, the ACOE Districts were directed to work closely with other Federal and state agencies in developing regional conditions to further protect aquatic habitat.

Effects on EFH

Pursuant to section 303(a)(7) of the MSFCMA, EFH has been described in Fishery Management Plans (FMPs) prepared by the Fishery Management Councils. On a nationwide basis, EFH includes a variety of aquatic habitats that, depending on the particular managed species and life stage, may extend as far offshore as the outer limit of the Exclusive Economic Zone (200 miles offshore), or as far inland as the freshwater streams and wetlands inhabited by anadromous fish. Activities adversely affecting EFH may include activities in EFH as well as activities that are outside EFH but have some indirect adverse effect on EFH. Based on the types of activities authorized by the proposed NWP, the EFH most likely to be affected is EFH in nearshore and inland waters and wetlands, rather than EFH in offshore areas. On a national basis, affected EFH may include nearshore marine areas, bays and estuaries, tidal and non-tidal rivers and streams, as well as fresh, brackish, and saline wetlands. EFH is described in more detail in each of the FMPs listed at the end of this document.

As described in the draft EAs developed by the ACOE, the potential adverse effects of the new and modified NWPs on aquatic habitat, including EFH, include: removal of vegetation; loss of habitat to fill; increased sedimentation; alteration of stream configuration and hydrology; alteration of benthic features from dredging; and discharges of small amounts of oil and grease from construction equipment. Effects on fish and shellfish, including managed species, may include: smothering of sessile organisms; displacement of motile organisms; loss of spawning areas, nursery areas, or other important habitat; and changes to habitat that make it unsuitable for managed species. Other adverse effects may occur depending on the specific project and affected area and species. The ACOE District Engineers (DEs) are responsible for using discretionary authority to condition an authorization or require an individual permit, if necessary, to ensure that all adverse effects, individually and cumulatively, are no more than minimal.

The acreage, linear foot, tidal waters, and other restrictions proposed for the new and modified NWPs provide a substantial amount of protection to EFH. The proposed general conditions that limit use of the NWPs in critical resource waters, impaired waters, and the 100-year floodplain provide additional protection against adverse impacts. The restriction on the use of NWPs in the 100-year floodplain is particularly important for protecting EFH for anadromous species.

#### Programmatic EFH Conservation Recommendations for the NWPs

The following programmatic EFH Conservation Recommendations are provided pursuant to section 305(b)(4)(A) of the MSFCMA:

1. ACOE headquarters should request that ACOE Districts work with NMFS regional offices to the extent necessary to develop NWP regional conditions that conserve EFH and are consistent with NMFS regional EFH Conservation Recommendations.

The extent of EFH and its vulnerability to adverse impacts from NWP-authorized activities depends heavily on regional factors and is therefore best addressed through regional conditions for the NWPs. To the extent required by the MSFCMA and the Clean Water Act, regional conditions should be developed for all NWPs to conserve EFH. NMFS regional offices are the

best sources of information on measures for conserving EFH and can provide information concerning EFH to ACOE Districts.

2) ACOE headquarters should inform the Districts that the provision in General Condition 13(e) directing the District Engineer to “provide no response to the resource agency” regarding comments on pre-construction notices (PCNs) does not apply to EFH Conservation Recommendations provided by NMFS.

With the implementation of regional conditions to conserve EFH, we expect that EFH Conservation Recommendations on PCNs will be limited to the relatively few projects where unanticipated circumstances increase the potential for adverse effects on EFH. However, pursuant to section 305(b)(4)(B) of the MSFCMA, the ACOE is required to respond to EFH Conservation Recommendations on PCNs within 30 days of their receipt. If the ACOE’s response is inconsistent with the EFH Conservation Recommendations, the ACOE shall explain its reasons for not following the recommendations. If 30 days is insufficient time for the ACOE to complete its review of all comments received on a PCN, the ACOE may be unable to respond fully within the 30-day timeframe specified in the MSFCMA. In this case, we recommend that the ACOE send NMFS a preliminary response within 30 days, and send a complete response when review of the comments and any necessary revisions to the authorization are completed.

#### Fish and Wildlife Coordination Act Comments on the NWP

*NWP 3. Maintenance.* In response to questions about the use of this NWP to authorize stabilization or replacement of upland areas lost to continuous erosive processes, language has been added that states “This permit cannot be used to reclaim historic lands lost, over an extended period of time, to normal erosive processes.” However, the words “historic” and “extended” suggest that this permit could be used to authorize reclamation of uplands lost to recent normal erosion over the past year or two. This current language should be replaced with language from the preamble that more correctly expresses the intent: “This permit cannot be used for the replacement of uplands lost through gradual erosion processes.”

*Regional Conditioning Process.* NMFS strongly supports the interagency coordination that occurred as part of developing regional conditions for the new and modified NWPs. We recommend that this process be used to develop regional conditions for the NWPs that will be re-authorized in 2001.

*Use of Upland Vegetated Buffers for Compensatory Mitigation.* The *Federal Register* notice recommends that Districts consider the use of upland vegetated buffers as compensatory mitigation for aquatic habitat impacts. NMFS is concerned that no objective guidance or methodology currently exists for determining when an upland vegetated buffer would be appropriate compensation for aquatic habitat loss. NMFS recommends that ACOE, NMFS, and other Federal agencies develop such guidance to ensure that upland buffers are used appropriately.

## Conclusion

Based on our review of the information provided by ACOE on the new and modified NWP's and the program's effects on EFH, NMFS has provided the EFH Conservation Recommendations above.

As required by section 305(b)(4)(B) of the MSFCMA, ACOE must respond in writing within 30 days of receiving these EFH Conservation Recommendations. ACOE must include in this response a description of measures ACOE proposes implementing to avoid, minimize, or mitigate adverse impacts on EFH. If ACOE's response is inconsistent with NMFS EFH Conservation Recommendations, ACOE must explain its reasons for not following the recommendations, including the scientific justification for any disagreements with NMFS over the anticipated effects of the proposed actions and the measures needed to avoid, minimize, mitigate, or offset such effects.

## Revision and Review

If any changes are made to the NWP program such that there may be different adverse effects on EFH, ACOE must so notify NMFS and the agencies will discuss whether the programmatic EFH Conservation Recommendations should be revised. Every five years or sooner, as appropriate, NMFS will review these programmatic EFH Conservation Recommendations and determine whether they should be updated to account for new information.

List of Fishery Management Plans with EFH Provisions (9/99)

<b>Fishery Management Council (FMC)</b>	<b>Fishery Management Plan</b>
Secretary of Commerce	Atlantic Billfish
New England FMC	Atlantic Highly Migratory Species
	Multispecies (groundfish)
	Sea Scallops
	Atlantic Salmon
Mid-Atlantic FMC	Monkfish
	Bluefish
	Atlantic Surfclam & Ocean Quahog
	Atlantic Mackerel, Squid, & Butterfish
South Atlantic FMC	Summer Flounder, Scup & Black Sea Bass
	Shrimp
	Red Drum
	Snapper-Grouper
	Coastal Migratory Pelagics
	Golden Crab
	Spiny Lobster
Carribean FMC	Coral, Coral Reefs, and Live/Hard Bottom
	Caribbean Reef Fish
	Queen Conch
	Spiny Lobster
Gulf of Mexico FMC	Coral, Plants, and Invertebrates
	Reef Fish Resources
	Red Drum
	Shrimp
	Coastal Migratory Pelagics
	Stone Crab
	Spiny Lobster
Western Pacific FMC	Coral and Coral Reefs
	Bottomfish and Seamount Groundfish
	Pelagics
	Crustaceans
Pacific FMC	Precious Corals
	Coastal Pelagic Species
	WA, OR, CA Salmon
	WA, OR, CA Groundfish
North Pacific FMC	Bering Sea/Aleutian Island Groundfish
	Gulf of Alaska Groundfish
	King and Tanner Crab
	Scallop
	Alaska Salmon



bcc: F/HC(R); F/HC2-Stedman; F/HC2(R); GCF-Hannuksela  
F/HC2:SStedman:9/21/99:pua:FN:g:\hc\corps\rep nwp efh cr